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No. 88-1417

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

SOMCHAI JARUSIRINUKUL,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS,
DISTRICT III

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Is an alien-defendant denied his right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution when, without being advised by his defense attorney about the deportation consequences of a criminal conviction, he pleads no contest and is thereafter convicted and ordered deported?

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, State of Wisconsin, respectfully requests this Court to deny the petition for writ of certiorari, seeking review of the opinion of the Wisconsin Court of Appeals, District III. That opinion is

unpublished but is reproduced in the appendix to the petition. P-Ap. 1-4.

The petitioner's Statement of the Case is accurate but omits one relevant fact. At the postconviction hearing in state court, petitioner's attorney testified that he told his client, "we would refer him to other counsel" if the issue of deportation later arose (Record 44:31).

REASONS FOR DENYING THE WRIT

I. THE UNANIMOUS VIEW OF THE FEDERAL COURTS THAT HAVE CONSIDERED THE QUESTION IS THAT DEFENSE COUNSEL'S FAILURE TO INFORM A PLEADING DEFENDANT OF THE IMMIGRATION CONSEQUENCES OF HIS PLEA DOES NOT RENDER HIS ASSISTANCE CONSTITUTIONALLY INEFFECTIVE UNDER THE SIXTH AMENDMENT, AND THE WISCONSIN COURT OF APPEALS' DECISION IS CONSISTENT WITH THE FEDERAL VIEW.

The petitioner's primary argument is that the writ should be granted to resolve a conflict between the Wisconsin court's

decision and those decisions of other state courts which hold that an alien-defendant may be denied the Sixth Amendment right to the effective assistance of counsel when his defense attorney fails to render proper advice about the immigration consequences of a plea. What the petitioner overlooks is that the federal courts which have addressed the issue unanimously hold that defense counsel's failure to inform a pleading defendant of the immigration consequences of his plea does not render counsel's assistance constitutionally ineffective.

In what appears to be the most recent federal appellate court pronouncement directly addressing the question, the Fourth Circuit a mere four months ago held that an attorney's failure to warn that a conviction could result in deportation does

not amount to constitutionally ineffective assistance of counsel:

> [W]e agree with the circuits which have decided the issue and found that an attorney's failure to advise a client that deportation may result from a conviction does not constitute ineffective assistance of counsel. United States v. Campbell, 778 F.2d 764, 768 (11th Cir. 1985); United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985); United States v. Santelises, 509 F.2d 703, 704 (2d Cir. 1975). To hold otherwise would place the unreasonable burden on defense counsel to ascertain and advise of the collateral consequences of a guilty plea which courts have uniformly held is not ineffective assistance of counsel. See, Campbell, 778 F.2d at 768-69; United States v. Sambro, 454 F.2d 918, 922 (D.C. Cir. 1971).

United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988).

The Yearwood court's failure to cite federal precedent to the contrary indicates that there is none. And a 1988 state court decision confirms that conclusion:

> [B]ecause a defendant's ignorance about the potential consequences of deportation does not render a

> guilty plea involuntary, the federal courts are virtually[1] unanimous in holding that failure of counsel to inform a defendant of possible deportation cannot rise to the level of ineffective assistance as a matter of federal law.

In Matter of Peters, 50 Wash. App. 702, 705-06, 750 P.2d 643, 645-46 (1988) (footnote 1 added; footnote 2 omitted; emphasis in original).

Despite what appears to be the unanimous view of the federal courts that an attorney's failure to inform a defendant of the possible immigration consequences of a plea does not constitute ineffective assistance of counsel, the petitioner urges this Court to accept review to resolve

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[1] In describing the state of federal law, the Washington Court of Appeals has shown an overabundance of caution in qualifying the predicate adjective "unanimous" with the adverb "virtually." It cites no federal decision holding to the contrary, and none appears to exist.

competing state court decisions on this issue. Petition at 7-8.

A review of those decisions reveals that the vast majority involve opinions of intermediate appellate courts. The only state court of last resort to have embraced the view advanced by the petitioner is the Colorado Supreme Court in People v. Pozo, 746 P.2d 523 (Colo. 1987) (en banc).[2] Given that the federal courts and the supreme courts of Florida[3] and Alaska[4] take the same position as the Wisconsin Court of Appeals

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[2]Although the petitioner represents that the Oregon Supreme Court's decision in Lyons v. Pearce, 298 Or. 554, 694 P.2d 969 (1985) (en banc), supports his position, the precise issue there was whether counsel's failure to request the trial court for a recommendation against deportation rendered his assistance constitutionally ineffective. The Oregon court held that it did.

[3]State v. Ginebra, 511 So. 2d 960, 961-62 (Fla. 1987).

[4]Tafoya v. State, 500 P.2d 247 (Alaska 1972), cert. denied, 410 U.S. 945 (1973).

assumed in this case and in State v. Santos, 136 Wis. 2d 528, 401 N.W.2d 856 (Ct. App.), rev. denied, 137 Wis. 2d 652, 411 N.W.2d 140 (1987),[5] this Court should not grant the writ merely to resolve what is largely a conflict among state intermediate appellate courts.

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[5]Subsequent to the Wisconsin Supreme Court's denial of his petition for review, Santos brought a federal habeas corpus action raising the same issue. The Eastern District of Wisconsin denied relief, and Santos appealed to the Seventh Circuit Court of Appeals, which heard oral argument in January, 1989. Jose C. Santos v. Darrell A. Kolb, No. 88-1724 (Seventh Circuit).

II. THE WISCONSIN COURT OF APPEALS' DECISION DOES NOT PERPETUATE A CONFLICT BETWEEN THE STATUTORY DUTIES OF WISCONSIN TRIAL COURTS AND THE CONSTITUTIONAL OBLIGATIONS OF DEFENSE COUNSEL REGARDING THE ADVICE TO BE GIVEN ALIEN-DEFENDANTS PRIOR TO TAKING A PLEA; EVEN IF IT DID SO, THE EXISTENCE OF SUCH A CONFLICT IS NOT THE CONCERN OF THE FEDERAL JUDICIARY.

The second reason the petitioner gives for granting the writ is to remedy a purported anomaly in Wisconsin law. Because Wisconsin trial courts are statutorily required to personally warn criminal defendants that a guilty or no contest plea may result in deportation,[6] the petitioner claims the state court of appeals' decision creates a conflict between the statutory duties of trial courts and the constitutional obligations

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[6]Wis. Stat. sec. 971.08(1)(c) (1987-88).

of criminal defense lawyers. Petition at 9-10.

At the outset, the petitioner is wrong in claiming that an anomaly exists. Neither the decision here nor in State v. Santos, 136 Wis. 2d 528, 401 N.W.2d 856, addresses whether the enactment of Wis. Stat. sec. 971.08(1)(c) and (2) created an implied duty on defense counsel to advise a client of the immigration consequences of a plea. That question simply was not presented here or in Santos because the Wisconsin statute was not in effect when Jarusirinukul or Santos entered their pleas. Now that Wisconsin trial courts are charged with a statutory duty to advise defendants of the possible immigration consequences of guilty or no contest pleas--with plea withdrawal the remedy for noncompliance--it is unlikely a Wisconsin court will ever have to confront the issue.

But since Santos and the state court of appeals' decision here found no duty on the part of either the trial court or defense counsel to render such advice, Santos did not create--and the decision below does not perpetuate--an anomaly in Wisconsin law.

Even if the claimed anomaly exists, it poses no harm to criminal defendants. A Wisconsin convict who can show that a plea entered on or after April 24, 1986,[7] is likely to result in deportation, exclusion from admission or denial of naturalization, is entitled to plea withdrawal if the trial court failed to warn him of the immigration consequences of the plea. Wis. Stat. sec. 971.08(1)(c) and (2). That the defendant's attorney may not have provided a similar warning is therefore inconsequential.

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[7]The statute became effective on that date.

Because the purported conflict between the statutory duty of the trial court and the constitutional obligation of defense counsel has no practical effect on the rights of criminal defendants, this Court's review is not warranted. More importantly, the possibility that an anomaly exists in Wisconsin law regarding a defendant's right to be advised of the immigration consequences of his plea is not a concern of the federal judiciary. Had the Wisconsin Supreme Court believed it necessary to remedy this purported conflict, it could have done so by granting review in this case or in Santos, but it did neither. This Court certainly should not be troubled by a state law anomaly that ostensibly does not concern the state's highest court.

III. THE WISCONSIN COURT OF APPEALS' FAILURE TO ANALYZE THE SIXTH AMENDMENT ISSUE WITHIN THE FRAMEWORK ESTABLISHED IN STRICKLAND V. WASHINGTON IS NOT A GOOD REASON FOR GRANTING THE WRIT.

A. Because the issue as framed in the state appeals court was whether this case could be distinguished from State v. Santos or, alternatively, whether Santos should be overruled, it was unnecessary for the state court to engage in a Strickland analysis.

When this case was appealed to District III of the Wisconsin Court of Appeals, District IV of that court had recently decided in State v. Santos, 136 Wis. 2d 528, 401 N.W.2d 856, that a defendant was not denied effective assistance of counsel under the Sixth Amendment when his trial attorney, aware of his client's status as an alien, failed to inform him of the possible immigration

consequences of his guilty plea. Therefore, the third district panel was not writing on a clean slate in petitioner's appeal; rather, the question was whether this case was distinguishable from Santos or, alternatively, whether Santos should be overruled a mere two years after it became law.[8] Because the case reached the state appellate court in this posture, there was no need to engage in the two-pronged analysis set forth in Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), for assessing claims of ineffective counsel. If an attorney has no duty to inform an alien-client of the immigration consequences of his plea, then the failure to do so cannot constitute

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[8]Although the question was phrased in the alternative, the court in its decision explained only why petitioner's case could not be distinguished from Santos and did not mention petitioner's request to overrule Santos. P-Ap. 2-3.

deficient performance, the first prong of the Strickland test. 466 U.S. at 687. By concluding that this case was not distinguishable from Santos, the Wisconsin Court of Appeals implicitly found that the deficient performance prong of Strickland could not be met, and it was unnecessary to discuss the prejudice requirement. See 466 U.S. at 697.

Insofar as the petitioner represents that the state court of appeals has decided--contrary to Strickland--that no individualized analysis is warranted in cases of this nature, he is only half right. Stated more accurately, once the court has determined that a case is controlled by Santos, then no further consideration is necessary to see if counsel's performance was deficient under Strickland. But each time an alien-defendant attempts to distinguish his

situation from that in Santos, individualized analysis will be required to determine if the Santos holding applies.

In conclusion, under the circumstances the failure of the state court decision to discuss the Sixth Amendment issue under a Strickland analysis was not a shortcoming and provides no reason for granting the writ.

B. Even if the state appeals court should have engaged in a Strickland analysis, its failure to do so is not cause for this Court's review.

Even if the Wisconsin court could be faulted for omitting any discussion of Strickland, that failing would not provide a reason to accept this case for review. The state appeals court signalled its belief that this case deserved rather cursory treatment, as evidenced by the

issuance of a per curiam decision ineligible for publication under the Wisconsin Rules of Evidence. See Wis. Stat. sec. 809.23(1)(b)5 (1987-88). As an unpublished per curiam decision of the state intermediate appellate court, the opinion below does not merit this Court's review. An unpublished opinion is of no precedential value. Wis. Stat. sec. 809.23(3) (1987-88).

IV. WHETHER AN ALIEN-DEFENDANT HAS A SIXTH AMENDMENT RIGHT TO THE ADVICE OF HIS ATTORNEY REGARDING THE POSSIBLE IMMIGRATION CONSEQUENCES OF A PLEA IS NOT A QUESTION OF IMPORTANCE TO THE GENERAL PUBLIC.

Citing a half-dozen articles culled from various legal journals, the petitioner asserts that this Court should resolve the question presented as a matter of public policy. Petition at 12-13.

Although the articles petitioner cites may indicate that the legal profession considers the issue an interesting one, these articles are not evidence that the issue is of interest to the general public. Apart from those in the legal profession, the only group of persons affected by resolution of this issue are those alien-defendants who pled guilty or no contest without knowing of the immigration consequences of their pleas and who are later ordered deported or excluded or are denied naturalization because of their convictions. This group, the respondent submits, is so small that the issue presented cannot fairly be characterized as being of interest to the general public.

Insofar as the general public may exhibit an interest in the issue, state legislatures are free to mandate that trial courts must advise defendants of the

possible immigration consequences of their pleas. According to the petitioner, seven states have already taken such a measure. Petition at 9.

Public policy does not warrant the granting of the writ.

CONCLUSION

For these reasons, this Court should deny the writ.

Respectfully submitted,

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